A **YANG DIPERTUA MAJLIS DAERAH GUA MUSANG**

**v.**

**PEDIK BUSU & ORS**

B COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
DAVID WONG DAK WAH JCA
TENGKU MAIMUN JCA
[CIVIL APPEAL NO: D-01-249-2009]
C 5 DECEMBER 2013

***LOCAL GOVERNMENT:*** *Buildings - Demolition order - Local authority serving demolition order on church building - Church building demolished by local authority for non-compliance with demolition order -* D *Church building not located within jurisdiction of local authority - Failure of local authority to give 30 days' notice before demolition - Whether demolition lawful - Whether local authority liable to pay damages - Whether local authority liable to pay exemplary damages - Street, Drainage and Building Act 1974, s. 72(4), (5)*

E The respondents were members of the Temiar tribe in Kampung Jias, within Kuala Betis of Gua Musang, Kelantan. On 11 April 2007, the Pejabat Tanah Dan Jajahan Gua Musang (the Land Office) ('the second defendant') issued a notice to Penghulu Kg. Jias requiring that the church building be demolished by the F Penghulu within two weeks of the notice on the ground of infringement into the Government land under s. 425 of the National Land Code ('NLC'). On 19 April 2007, the appellant issued a notice under s. 72(4) of the Street, Drainage and Building Act 1974 ('the Act') requiring them to demolish the G church building within seven days on the ground that it was built without the permission from the local authority. On 24 May 2007, the appellant issued a notice under s. 72(5) of the Act to the first respondent to demolish the church building within seven days. On 4 June 2007, in less than the 30 days' notice from its letter dated H 24 May 2007, the officers from Majlis Daerah Gua Musang demolished the church building by force. The demolition was admitted by the appellant. After the demolition, a hall was built upon the same site where the church building stood without prior permission of the aboriginal people and without acquisition of the I land by the appellant and the second and third defendants.

Hence, the respondents commenced an action against the defendants claiming, *inter alia*: (i) a declaration that the respondents had rights to the land occupied by them; (ii) a declaration that the respondents had rights to practice the religion of their choice under the Federal Constitution; (iii) declarations that the notices issued under s. 425 of the NLC and s. 72 of the Act were null and void; (iv) declarations that the demolition of the church building was unlawful, an abuse of power and an interference into the religious affair of the Orang Asli; (v) a declaration that the erection of a hall was a trespass to the land of the respondents; and (vi) damages for the demolition of the church building and trespass to the respondents' land. The respondents claimed that the land on which the church building was built was on Orang Asli land whereas the appellant claimed that the land fell within the appellants' jurisdiction. The High Court Judge only allowed general damages and exemplary damages on the ground that the appellant had failed to serve a 30 days' notice on the respondents before demolishing the church building. The appellant appealed against that decision. The appellant, *inter alia*, submitted that the respondents had suffered no damages, thus were not entitled to it. It was also submitted that exemplary damages must be pleaded. Counsel for the respondents however informed the court that they did not pursue exemplary damages.

**Held (setting aside order as to exemplary damages but otherwise dismissing appeal with costs)**
**Per Abdul Wahab Patail JCA delivering the judgment of the court:**

**(1)** The pleadings showed a dispute whether the church building was located within the area of jurisdiction of the appellant. The finding by the High Court that the appellant had jurisdiction was the pivotal basis to the question of authority of the appellant under the Act over the church building on the land occupied by the respondents, but there was no evidential basis for the finding. (paras 26-27)

**(2)** The appellant claimed that it was entitled to rely on s. 72(1) and (5) of the Act and there was no necessity to give a 30 days' notice. This would be true if the appellant had issued the first notice only. But the appellant elected to issue the second notice giving the respondents 30 days to demolish the

church building. But without waiting for 30 days, the appellant proceeded with the demolition about 20 days later. Had the respondents had the balance ten days, they could have minimised their losses even if they had to demolish the church building themselves. They had a legitimate expectation that they had another ten days. The appellant was estopped from denying them the ten days. (para 29)

**(3)** The submission that the High Court erred in holding that the appellant had to pay damages because another party had built a building on the site where the church building had stood was without merit, for even if the respondents could use the said building, it was not the church building that they had built earlier. (para 34)

**(4)** Section 72(5) underlines the need for the local authority to abide by the terms of its notice. (para 36)

***Obiter:***

**(1)** The party upon whom a claim is made must not be taken by surprise. Thus, a cause of action and the facts relied upon must be pleaded, so that a defendant has the opportunity to check and verify, to determine, even if not untrue and not incorrect, whether it is true and correctly stated. However, if the submission for a claim that is not pleaded shows it is founded upon evidence that has been admitted without objection, and upon which the other party had addressed in cross-examination or re-examination, or had the opportunity to do so, there is no reason for the trial judge to refuse to entertain the submission, particularly for exemplary damages because the very conduct warranting exemplary damages often only emerge during trial. It would not be in the interests of justice that the failure to plead exemplary damages must necessarily bar a party from seeking it in submissions and the court from considering it.

***Bahasa Malaysia*** *Translation Of Headnotes*

Responden-responden merupakan ahli puak Temiar di Kampung Jias, di Kuala Betis, Gua Musang, Kelantan. Pada 11 April 2007, Pejabat Tanah dan Jajahan Gua Musang ('Pejabat Tanah') ('defendan kedua') mengeluarkan notis kepada Penghulu Kg. Jias

agar bangunan gereja dirobohkan oleh Penghulu melalui notis dua minggu atas alasan pelanggaran tanah kerajaan di bawah s. 425 Kanun Tanah Negara ('KTN'). Pada 19 April 2007, perayu mengeluarkan notis di bawah s. 72(4) Akta Jalan, Parit dan Bangunan 1974 ('Akta') yang memerlukan mereka untuk merobohkan bangunan gereja tersebut dalam masa tujuh hari atas alasan bahawa ia dibina tanpa kebenaran daripada pihak berkuasa tempatan. Pada 24 Mei 2007, perayu mengeluarkan notis di bawah s. 72(5) Akta kepada responden pertama untuk merobohkan bangunan gereja dalam masa tujuh hari. Pada 4 Jun 2007, dalam kurang dari notis 30 hari daripada surat bertarikh 24 Mei 2007, pegawai-pegawai daripada Majlis Daerah Gua Musang telah merobohkan bangunan gereja secara paksa. Perobohan tersebut diakui oleh perayu. Selepas perobohan, sebuah dewan dibina atas tapak yang mana bangunan gereja tersebut didirikan tanpa kebenaran Orang Asli dan tanpa pengambilan tanah oleh perayu dan defendan-defendan kedua dan ketiga. Oleh itu, responden-responden memulakan tindakan terhadap defendan-defendan bagi menuntut, antara lain: (i) satu deklarasi bahawa responden-responden mempunyai hak ke atas tanah yang diduduki oleh mereka; (ii) satu deklarasi bahawa responden-responden mempunyai hak untuk mengamalkan agama pilihan mereka di bawah Perlembagaan Persekutuan; (iii) deklarasi-deklarasi bahawa notis-notis yang dikeluarkan di bawah s. 425 KTN dan s. 72 Akta adalah batal dan tidak sah; (iv) deklarasi-deklarasi bahawa perobohan bangunan gereja adalah tidak sah, satu penyalahgunaan kuasa dan satu campur tangan dalam hal ehwal agama Orang Asli; (v) satu deklarasi bahawa pembinaan dewan tersebut adalah pencerobohan ke atas tanah responden-responden. Responden-responden mendakwa bahawa tanah di mana terbinanya bangunan gereja tersebut adalah atas tanah Orang Asli sedangkan perayu-perayu mendakwa bahawa tanah tersebut terangkum di bawah bidang kuasa perayu. Hakim Mahkamah Tinggi hanya membenarkan ganti rugi am dan teladan atas alasan bahawa perayu gagal menyampaikan notis 30 hari kepada responden-responden sebelum merobohkan bangunan gereja tersebut. Perayu merayu terhadap keputusan tersebut. Perayu, antara lain, menghujahkan bahawa responden-responden tidak mengalami sebarang kerugian dan oleh itu tidak berhak ke atas ganti rugi. Dihujahkan lagi bahawa ganti rugi teladan mestilah diplidkan. Peguam responden, walau bagaimanapun, memaklumkan kepada mahkamah bahawa mereka tidak menuntut ganti rugi teladan.

**Diputuskan (mengenepikan perintah ganti rugi teladan tetapi menolak menolak rayuan dengan kes)**
**Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:**

**(1)** Pliding menunjukkan satu pertikaian sama ada bangunan gereja terletak dalam kawasan bidang kuasa perayu. Dapatan Mahkamah Tinggi bahawa perayu mempunyai bidang kuasa adalah asas penting kepada persoalan mengenai kuasa perayu di bawah Akta, ke atas bangunan gereja atas tanah yang diduduki oleh responden-responden, tetapi tiada asas bukti bagi dapatan sedemikian.

**(2)** Perayu menghujahkan bahawa ia berhak untuk bersandarkan pada s. 72(1) dan (5) Akta dan tiada keperluan untuk memberi notis 30 hari. Ini adalah benar sekiranya perayu telah mengeluarkan notis pertama sahaja. Namun begitu, perayu memilih untuk mengeluarkan notis kedua, memberikan responden 30 hari untuk merobohkan bangunan gereja. Walau bagaimanapun, tanpa menunggu 30 hari, perayu meneruskan dengan perobohan 20 hari kemudian. Sekiranya responden-responden mempunyai baki sepuluh hari, mereka boleh meminimakan kerugian mereka jika pun mereka terpaksa merobohkan bangunan gereja tersebut sendiri. Mereka mempunyai harapan yang sah bahawa mereka ada sepuluh hari lagi. Perayu diestop daripada menafikan sepuluh hari tersebut daripada mereka.

**(3)** Hujahan bahawa Mahkamah Tinggi terkhilaf dalam memutuskan bahawa perayu perlu membayar ganti rugi kerana satu lagi pihak telah membina sebuah bangunan atas tapak di mana berdirinya bangunan gereja adalah tidak bermerit, kerana jika pun responden-responden boleh menggunakan bangunan tersebut, ia bukanlah bangunan gereja yang mereka bina dahulu.

**(4)** Seksyen 72(5) menggariskan keperluan bagi pihak berkuasa tempatan untuk mematuhi terma-terma notisnya.

***Obiter:***

**(1)** Pihak yang mana satu tuntutan dibuat tidak boleh dikejutkan. Oleh itu, kausa tindakan dan fakta-fakta yang disandarkan mestilah diplidkan, agar defendan mempunyai peluang untuk memeriksa dan mengesahkan, untuk memastikan, sekiranya

adalah tidak benar dan tidak betul, sama ada ia dinyatakan dengan benar dan betul. Walau bagaimanapun, sekiranya hujahan bagi tuntutan yang tidak diplidkan menunjukkan bahawa ia berasaskan keterangan yang telah diterima tanpa bantahan, dan yang mana padanya pihak satu lagi telah ajukan dalam pemeriksaan balas atau pemeriksaan semula, atau mempunyai peluang untuk berbuat sedemikian, tiada alasan untuk hakim bicara menolak daripada mendengar hujahan, khasnya ganti rugi teladan kerana tindakan yang mewajarkan ganti rugi teladan kebiasaannya timbul semasa perbicaraan. Adalah tidak menjadi kepentingan keadilan bahawa kegagalan memplidkan ganti rugi teladan semestinya menghalang satu pihak daripada memohonnya dalam penghujahan dan daripada mahkamah agar mempertimbangkannya.

**Case(s) referred to:**

*Foong Chee Chong v. Inspector Mohd Nasir Shamsuddin & Anor [1998] 4 CLJ 309 HC* ***(refd)***

*Muniandy Subramanian & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor [2003] 4 CLJ 123 HC* ***(refd)***

*Ng Chooi Aw & Anor v. Eng Ah Jam & Anor [2008] 4 CLJ 642 HC* ***(refd)***

*Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665 CA* ***(refd)***

*Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors [2005] 4 CLJ 169 CA* ***(refd)***

*Kok Hoong Tan Dennis & Ors v. PP [1977] 1 SLR 123* ***(refd)***

**Legislation referred to:**

Aboriginal Peoples Act 1954, s. 3(d)
Federal Constitution, arts. 15, 160
National Land Code, ss. 4(2)(a), 5, 425
Street, Drainage and Building Act 1974, ss. 70, 72(1), (4), (5)

*For the appellant - Sulaiman Abdullah (Raja Ahmad Mohzanuddin Shah, Sollehauddin Muzaid, Abu Daud Abd Rahim & Faizah Khamarudin with him); M/s Azmi & Assocs*

*For the respondents - N Subramaniyan (Lum Chee Seng with him); M/s Subramaniyan*

*[Editor's note: For the High Court judgment, please see Pedik Busu & Yang Lain lwn. Yang Dipertua Majlis Daerah Gua Musang & Yang Lain [2010] 4 CLJ 868]*

*Reported by Amutha Suppayah*

A

## JUDGMENT

**Abdul Wahab Patail JCA:**

**[1]** The respondents are members of the Temiar tribe in Kampung Jias, within Kuala Betis of Gua Musang, in the State of Kelantan. By an Originating Summons No: 24-245-2007, they sought the following orders:

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(i) A declaration that the respondents have rights to the land occupied by them in Kg Jias RPS in the area of Kuala Betis, Gua Musang;

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(ii) A declaration that the respondents have rights to practice religion of their choice under the Federal Constitution;

(iii) A declaration that the notice issued by the Land Authority under s. 425 of the National Land Code be null and void and against the Federal Constitution;

D

(iv) A declaration that the notice issued by Majlis Daerah Gua Musang (the appellant/first defendant) under s. 72 of the Street, Drainage and Building Act 1974 be null and void;

E

(v) A declaration that the demolition of the house of worship (church building) by the Land Office and Majlis Daerah Gua Musang is unlawful;

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(vi) A declaration that the demolition of the church building by the land office and Majlis Daerah Gua Musang is an abuse of power and an interference into the religious affair of the Orang Asli;

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(vii) A declaration that the erection of a Dewan on the same site where the church building was, is a trespass to the land of the respondents;

(viii) Damages for the demolition of the church building and trespass to the land of the respondents;

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(ix) Costs; and

(x) Other relief that the court deems fit.

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**[2]** On 15 July 2009, the High Court had partially allowed the respondents' Originating Summons No. 24-245-2007 as follows: A

1. Pemilikan tanah Plaintif dalam hartanah itu sah, walau pun hartanah itu bukan tanah adat dan belum dikeluarkan hakmilik kepada mereka.

B

2. Mereka berhak mengamalkan agama pilihan mereka. Mereka juga boleh membina rumah ibadat mereka walau pun ia bukan hak adat dan budaya mereka, namun ia hendaklah mematuhi kehendak undang-undang khusus Akta Jalan, Parit dan Bangunan 1974 memandangkan kawasan tanah mereka itu telah diwartakan oleh Kn PU 956 dan ditetapkan di bawah penyeliaan Majlis Daerah Gua Musang. Permohonan membina bangunan rumah ibadat itu hendaklah dikemukakan kepada Defendan 1. Oleh kerana Akta tersebut tidak dipatuhi, pembinaan rumah ibadat itu adalah tidak sah.

C

D

3. Notis di bawah seksyen 425 KTN boleh dikeluarkan oleh Defendan 2. Ia sah. Namun, terdapat dua lagi notis yang dikeluarkan oleh Defendan 1 yang memberi tempoh 30 hari, Ekshibit P3, maka notis-notis P3 ini hendaklah dibaca bersama dengan Ekshibit P2. Tempoh 30 hari patut diikuti.

E

4. Notis yang tepat di bawah seksyen 72(6) juga boleh dikeluarkan oleh Defendan 1 tetapi Defendan 1 sendiri tidak mematuhi tempoh notis 30 hari yang diberi.

5. Prayer 5, perobohan rumah ibadat itu tidak wajar dilakukan sebelum tempoh 30 hari tamat. Defendan 1 dan 2 sepatutnya meroboh rumah ibadat itu selepas notis 30 hari tamat sekiranya Plaintif-Plaintif masih gagal mematuhi peruntukan undang-undang tersebut.

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6. Prayer 6 adalah positif.

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7. Prayer 7 adalah negatif.

8. Tindakan Defendan 1 dan 2 adalah tidak mematuhi peruntukan notis yang dikeluarkan oleh mereka sendiri. Mahkamah ini memerintahkan Defendan 1 - 3 membayar gantirugi kepada Plaintif-Plaintif dengan kos. Kerugian hendaklah ditaksirkan. Mahkamah juga mengawadkan gantirugi teladan berdasarkan kepada keputusan kes *Mahkamah Rayuan Kerajaan Negeri Selangor & 3 Ors v Sagong bin Tasi & 6 Ors* [2005] 5 AMR 625. Gantirugi itu hendaklah ditaksirkan.

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## The Chronology

**[3]** The chronology may be set out as follows:

(a) 11 April 2007, the Pejabat Tanah Dan Jajahan Gua Musang (land office) (second defendant) issued a notice to penghulu Kg Jias requiring that the church building be demolished by the penghulu within two weeks of the notice on ground of infringement into the government land under s. 425 of the National Land Code, failing which action would be taken against the Penghulu.

(b) 19 April 2007, the Yang Dipertua Majlis Daerah Gua Musang issued a notice under s. 72(4) of the Street, Drainage and Building Act 1974 to "Tuan punya Bangunan Kg Jias Kuala Betis" requiring them to demolish the church building within seven days on ground that it was built without permission from the local authority.

(c) 24 May 2007, the Yang Dipertua Majlis Daerah Gua Musang issued a notice under s. 72(5) of the Street, Drainage and Building Act 1974 to "Pedik Bin Busu" (the first respondent), to demolish the church building within seven days.

(d) 25 May 2007, the National Evangelical Christian Fellowship Malaysia (NECF) issued an appeal to the Yang Dipertua Majlis Daerah Gua Musang to withdraw its notice and pointed out to the freedom of worship and religion practised in this country.

(e) 28 May 2007, the solicitors for the plaintiffs issued a letter of warning to Yang Dipertua Majlis Daerah Gua Musang not to demolish the church building.

(f) 4 June 2007, in less than the 30 days' notice from its letter dated 24 May 2007, at about 10am, about 20 uniformed officers from Majlis Daerah Gua Musang, accompanied by about 100 armed police personnel appeared in Kg Jias, began destroying and demolishing church building by force, using a bulldozer. Within an hour, the church building was completely destroyed and demolished. During that time, most of the men of the village were not at home. Penghulu Pedik Bin Busu was in Pahang. The demolition was admitted by the appellant in its affidavit.

(g) 6 June 2007, two days later Penghulu Pedik Bin Busu lodged a police report at Gua Musang police station regarding the destruction of the church building. After the demolition, a dewan was built upon the same site where the church building stood without prior permission of the aboriginal people and without acquisition of the land by the appellant and the second and third defendants. The dewan is not used by anyone in the village.

(h) 29 July 2007, the respondents commenced an action in the Kota Bharu High Court. Throughout the proceedings in the High Court, the second and third defendants had not filed any affidavit to rebut and/or deny the claims asserted by the respondents under oath, including the respondents' identities as aboriginal people of Temiar tribe and their village being exclusively an aboriginal area.

(i) 15 July 2009, the learned judge of Kota Bharu High Court made the order in which he only allowed general damages and exemplary damages to be assessed by Deputy Registrar and paid by the appellant for demolishing the church building of the respondents with costs on the ground that the appellant had failed to serve a 30 days' notice on the respondents before demolishing the church building.

## The Appeal

**[4]** Before us, the appellant appealed upon the following grounds:

(a) Ground One

Erred in holding that since the first defendant's action of demolishing the church building which was built by the plaintiffs had failed to comply with the first defendant's own notice, the first defendant was therefore ordered to pay general and exemplary damages when in fact the learned judge should not have made such order or any order as to damages at all.

(b) Ground Two

Erred in holding that the first defendant's action of demolishing the church building which was built by the plaintiffs had failed to comply with the 30 days' notice issued by the first defendant which should have been read together

with the notice issued by the second defendant dated 11 April 2007, therefore had failed to comply with the first defendant's own notice.

(c) Ground Three

Erred in applying the principle of law as enunciated in the case of *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 5 AMR 625 specifically the principle of exemplary damages as awarded against the first defendant.

(d) Ground Four

Erred in holding that the first defendant has to pay damages to the plaintiffs whereas the fact shows that after the demolition of the church building, a third party had erected a new building on the said land wherein it was not built by the first defendant or the plaintiffs, and also failed to take into consideration the said provision under s. 72(5) of the Street, Drainage and Building Act 1974.

**[5]** In respect of ground one, it was submitted that pursuant to s. 5 of the National Land Code, the land belongs to the state government, not a customary land and the fact that the aborigines were given an exclusive right to live in Kampung Jias RPS, Kuala Betis, does not indicate that they will acquire the native customary rights automatically. Further, the land was gazetted by the Kelantan State Government *vide* Gazette Kn PU 956 dated 15 September 2005 with effect from 1 September 2005, therefore the said land falls under the jurisdiction of the first defendant, and accordingly the Street, Drainage and Building Act 1974 applies to the land, displacing the application of the Aboriginal Peoples Act 1954 thereon. The first defendant had authority to demolish any building which has been erected within its jurisdiction if the building is erected in contravention of the prescribed laws, and since the respondents had failed to obtain prior approval from the first defendant before erecting the said building, the church building was illegal per s. 70 of the Street, Drainage and Building Act 1974. Finally, building of the church building is subject to the requirements of the law specifically under the Street, Drainage and Building Act 1974.

**[6]** In *Kok Hoong Tan Dennis & Ors v. PP* [1977] 1 SLR 123, it was held:

> Article 15 of the Constitution merely establishes the right of a person to profess and practise his religion. It does not regulate the exercise of this right. The latter is left to legislation and other laws, as expressly provided for under art 15(4). As the trial judge said, if one were to take the appellants' argument to its logical extreme, no society in Singapore needs to be registered.

**[7]** In *Muniandy Subramanian & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 4 CLJ 123:

> On this matter, let me make it absolutely clear that this case has nothing to do with infringement of the plaintiffs' rights as enshrined in art. II. That right as provided in cl. (3)(a)(b) and (c) of that article is subject to the condition that they must conduct themselves "in accordance with law". There are countless houses of worship in this country existing peacefully without any unnecessary interference. That is because they conducted themselves within the law. The plaintiffs, like everyone else, are duty bound to obey and respect the law.

**[8]** In respect of ground two, it was submitted that the notice issued by the first defendant dated 24 May 2007 was only for seven days, not 30 days, and it was legally and properly issued by the first defendant based on the situation and condition of the building and the fact that there was no person in actual occupation of the building. Majlis Daerah Gua Musang was satisfied that a building was in the course of being erected in contravention of s. 70 of the Street, Drainage and Building Act 1974. An earlier notice dated 11 April 2007 by the second defendant under s. 425 of the National Land Code had required the recipient therein to immediately abstain from commencing or proceeding with the erection of such building and to demolish such building within two weeks from the date of the notice. And the notice dated 19 April 2007 by the first defendant under s. 70 of the Street, Drainage and Building Act 1974 required the recipient therein to abstain from proceeding with the erection of the said building without obtaining approval from Majlis Daerah Gua Musang, within seven days from the date of the notice. And the second notice dated 24 May 2007 was a final notice by the first defendant requiring the recipient/owner of the land therein to

demolish the said building within seven days from the date of the notice. It gave notice that any failure to comply with the notices was an offence and Majlis Daerah Gua Musang can take action to demolish the said building pursuant to s. 72(5) of the Street, Drainage and Building Act 1974. The first defendant is entitled to rely on the said ss. 72(1) and (5) of the Street, Drainage and Building Act 1974 and there was no necessity to give a 30 days' notice. In any case, the time period between the first notice ie, 19 April 2007 and the date of demolition ie, 4 June 2007 is approximately 46 days, which is more than 30 days.

**[9]** In respect of the third ground, it was submitted that the High Court erred in applying *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 5 AMR 625, specifically the principle of exemplary damages as awarded against the first defendant despite the fact that exemplary damages was never pleaded by the plaintiffs in their originating summons. In *Ng Chooi Aw & Anor v. Eng Ah Jam & Anor* [2008] 4 CLJ 642, it was held that "As regards, to the appellants' claim for exemplary damages, I refused the same primarily on the grounds that the said claim was not specifically pleaded by the appellants in their statement of claim." In *Foong Chee Chong v. Inspector Mohd Nasir Shamsuddin & Anor* [1998] 4 CLJ 309; [1998] 6 MLJ 421, it was stated that "For me, it stands to reason that the facts upon which exemplary damages ought to be awarded should be made known at the early stage to the opposing party so that sufficient time is given to prepare an answer. This can only be achieved by pleading the same ... to allow a claim for exemplary damages at this late stage is surely a conduct amounting to an ambush which does not serve the cause of justice." *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169; [2005] 5 AMR 625: "Based on the incontrovertible evidence on record, the defendant was seeking to gain the plaintiffs' land at the expense of the plaintiffs. This is accordingly a case where it is necessary to teach the third defendant wrongdoer that tort does not pay ...".

**[10]** This was a case where the third defendant with the positive assistance of the first and fourth defendants had gone onto and committed a deliberate act of trespass. The second defendant is a joint and several tortfeasor in the act of trespass. My reading of the evidence is that the plaintiffs were subjected to harsh, cruel and oppressive treatment. Accordingly, in my judgment this is a

proper case to award exemplary damages against both the second and third defendants." And s. 72(5) of the Street, Drainage and Building Act 1974 provides that if the first defendant implements the demolition by itself, the plaintiffs shall be deemed to have indemnified the first defendant in carrying out the terms of the notice; therefore no such order to pay damages shall have been borne by the first defendant. Section 72(5) of the Street, Drainage and Building Act 1974: "(5) Where the owner fails to comply with the requirements of the notice, the local authority may do any or all of the acts required by the notice and notwithstanding the owner's liability to pay any fine under sub-s. (4), the owner shall pay such sums to the local authority as may be required under sub-s. (3) and shall be deemed to have indemnified the local authority in carrying out the terms of the notice as if he had requested the local authority to do so."

**[11]** In respect of the fourth ground, it was submitted that the High Court erred in holding that the first defendant has to pay damages to the plaintiffs whereas the fact shows that after the demolition of the church building, a third party had erected a new building on the said land wherein it was not built by the first defendant or the plaintiffs, and also failed to take into consideration the said provision under s. 72(5) of the Street, Drainage and Building Act 1974. Therefore, the plaintiffs have suffered no damages, thus are not entitled to it.

## The Cross-appeal

**[12]** The respondents have cross-appealed on the following grounds:

(a) Ground One

Erred in holding that the homeland held by the respondents are not customary land and no land title has been issued to them.

(b) Ground Two

Erred on the applicability of s. 72 of the Street, Drainage and Building Act 1974 to land without title.

(c) Ground Three

Erred on the applicability of the National Land Code to orang asli land.

(d) Ground Four

Erred in a negative holding on the declaration that the erection of a dewan on the same site where the church building was is a trespass to the land of the respondents.

**[13]** At the hearing before us, counsel informed the court that the respondents are not proceeding with the cross-appeal.

**General Observations**

**[14]** It is trite that regardless of the purpose for which a building is built, so long as it is built in an area within the jurisdiction of a local authority, the builder or owner must obtain prior approval from the local authority before erecting a building (s. 70 of the Street, Drainage and Building Act 1974), and where he has failed to do so, the local authority has the authority to demolish any building which has been erected within its jurisdiction if the building is erected without approval or in contravention of the prescribed laws. This case has nothing to do with art. 15 of the Federal Constitution which merely establishes the right of a person to profess and practice his religion: *Kok Hoong Tan Dennis & Ors v. PP* [1977] 1 SLR 123. That the building is intended as a place of worship of a religion, or built or funded by a religious body is irrelevant to the question of law in this appeal. Religious bodies, like everyone else, must comply with the law.

**[15]** Resolution of Originating Summons No. 24-245-2007 commenced by the respondents is no different from any other affidavit based application. To justify the grant of the orders sought, facts relied upon are set out in the supporting affidavits. If the facts in the supporting affidavits are not disputed by the defendant, they are deemed to have been accepted and the court may safely rely upon it in addressing the question of law whether the orders sought may be granted. If any fact is disputed in an opposing affidavit, the plaintiff may abandon the fact opposed and proceed on the basis of the remaining undisputed facts. If the plaintiff should insist on pursuing his version of the disputed fact, then he should apply to convert the originating summons into a

writ so that the procedures of disclosure and verification are available and may be resorted to if desired in order to resolve the dispute on that disputed fact. Where not such application is made by a plaintiff in an affidavit based application such as the instant originating summons, then it must be taken that the plaintiff elects to proceed only upon the undisputed facts.

**[16]** In the High Court, the parties had proceeded with the hearing of the originating summons. Before us, both parties resorted in their submissions, to "facts" as necessary for their argument, but had not troubled themselves to assist the court by analysing the affidavits to determine what facts are not disputed and can safely be relied upon, and what facts are disputed and should be disregarded from consideration under the affidavit based procedure. Instead of the submissions being towering elucidations of facts that can safely be relied upon and applying the law thereon in order to arrive at a fair and just decision, the submissions were nothing more than argument where each party seeks to win.

## The High Court

**[17]** We examined the grounds of decision of the learned judge of the High Court.

**[18]** The learned judge addressed the orders sought and set out the main grounds relied upon, stating that the complete grounds relied upon by the respondent herein are in their affidavits at encl. 2 and encl. 9, and by the appellant herein and its complete grounds in encl. 5. We note that the second and third defendants, the Penolong Pentadbir Tanah dan Jajahan Gua Musang and Kerajaan Negeri Kelantan respectively, did not file affidavits nor did they appeal. The learned judge then set out the issues he had to answer before proceeding to his findings and decision.

**[19]** On the first issue, the learned judge held because of Warta Kn PU 956 by the Kerajaan Negeri Kelantan dated 15 September 2005 and effective on 1 September 2005, the appellant herein had authority over orang asli land within it, and that the Street, Drainage and Building Act 1974 overrides Akta Orang Asli.

**[20]** On the second issue, the learned judge held a "rumah ibadat" is not within "hak adat dan budaya Orang Asli" and reasoning was "kerana memeluk agama Kristian adalah amalan baru dan bukan amalan turun temurun nenek moyang mereka." In this, the learned judge referred to a passage in *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors* [1998] 2 CLJ 665 in the High Court:

> The aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial.

**[21]** The learned judge said this was approved by the Court of Appeal.

**[22]** On the third issue, the learned judge held that the building of a church building is allowed but compliance with provisions of law is required. The learned judge held that the respondents herein had not applied for approval to build the building.

**[23]** On the fourth issue, the learned judge held that title had not been issued to the respondents herein. He then referred to Mahkamah Rayuan, *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* [2005] 4 CLJ 169 that by virtue of s. 4(2)(a) of the National Land Code did not apply to orang asli customary land. But he held that the land was not orang asli customary land because the land was "Rancangan Penempatan Semula" land and no title had been issued.

**[24]** On the fifth issue, the learned judge held the appellant did not comply with their own notice (exh. P3) when they did not wait for 30 days before demolishing the building. He held exh. P2 gave two weeks from 11 April 2007, P3 gave 30 days, and since the appellant acted together with the Penolong Pentadbir Tanah dan Jajahan Gua Musang, it was proper that the benefit of the 30 days' notice be accorded to the respondents.

**[25]** We examined the following:

(a) The respondents' originating summons dated 29 July 2007;

(b) The respondents' affidavit in support affirmed by Pedik bin Busu on 24 July 2007;

(c) The appellant's affidavit in reply affirmed by Mohd Azri bin Abd Rahman on 25 September 2007; and

(d) The respondents' affidavit in reply affirmed by Pedik bin Busu on 7 January 2008.

## Findings

**[26]** The respondents had maintained the land on which the church building was built was on orang asli land, and the appellant had maintained the land fell within the area under the jurisdiction of the appellant, and therefore the Street, Drainage and Building Act 1974 applied. This means whether the church building was within the area under the jurisdiction of the appellant was disputed. It is a fact asserted by the appellant. The only evidence adduced were Kn PU 956 and 958. The only mention of Gua Musang is in Kn PU 958, and neither gazette notifications made any mention of Kampung Jias or Kawasan Kuala Betis. No map was produced to show the location of the church building within any area under the jurisdiction of the appellant. Though there is no doubt the appellant had issued the notices and was responsible for the demolition, the pleadings did show a dispute whether the church building was located within the area of jurisdiction of the appellant.

**[27]** The finding by the High Court that the appellant had jurisdiction was the pivotal basis to the question of authority of the appellant under the Street, Drainage and Building Act 1974 over the church building on the land occupied by the respondents, but there is no evidential basis for the finding.

**[28]** Only if the appellant had established such jurisdiction as they have pleaded would the question of whether the Street, Drainage and Building Act 1974 applied to houses of worship arise. The finding by the learned judge that builders of a house of worship must comply with building laws etc, following *Kok Hoong Tan Dennis & Ors v. PP* (*supra*) and *Muniandy Subramanian & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* (*supra*) would not be an error but only if it is established it had jurisdiction over the land on which the church building was built.

**[29]** It was submitted by the appellant that it is entitled to rely on ss. 72(1) and (5) of the Street, Drainage and Building Act 1974 and there was no necessity to give a 30 days' notice. This would be true if the appellant had issued the first notice only. But the appellant elected to issue the second notice giving the respondents 30 days to demolish the church building. But without waiting 30 days, the appellant proceeded with demolition about 20 days later. The demolition was done in about an hour. Had the respondents had the balance ten days they could have minimised their losses even if they had to demolish the church building themselves. They have a legitimate expectation they had another ten days. The appellant is estopped from denying them the ten days. We, therefore, find no merit in the submission of the appellant. We hold that the learned judge did not err in holding that the appellants herein had not adhered to the 30 days' notice they had given.

**[30]** The further finding, relying on *Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors*, by the learned judge that building a church is not within the rights and culture of orang asli because to follow the Christian religion is a new practice and not within that of their ancestors warrants much caution. Because the ancestors were also not of any religion, would it seriously be intended that an orang asli would lose his status as an orang asli if he joins any religion at all, not just Christianity? That would condemn the orang asli to be cultural specimens petrified or frozen into the times of their ancestors. That would be contrary to the efforts to help the orang asli evolve and improve their conditions. See *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* (*supra*). Section 3(d) of the Aboriginal Peoples Act 1954 specifically provides:

> Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practicing that religion.

**[31]** We contrast this with the definition of Malay in art. 160 of the Federal Constitution. A

> 'Malay' means a person who professes the religion of Islam, habitually speaks the Malay language, conforms to Malay custom and - (a) was before Merdeka Day born in the Federation or in Singapore or born of parents one of whom was born in the Federation or in Singapore, or is on that day domiciled in the Federation or in Singapore; or (b) is the issue of such a person ... ; B

**[32]** It must be borne in mind that rights, once recognised, cannot be taken away. To our minds, orang asli are as entitled as any other citizen to protection of their rights under the Federal Constitution. On the question of rights, the law must tread softly so that the pursuit of one party's rights does not end up stepping upon another party's rights, for the parties are each equally entitled to their rights. The further notion in the argument that their rights once acquired can be taken away on the ground they have evolved is a notion that is fundamentally flawed. C D

**[33]** The appellant's submission on the issue of exemplary damages relied upon the High Court decisions in *Foong Chee Chong v. Inspector Mohd Nasir Shamsuddin & Anor* (*supra*), *Ng Chooi Aw & Anor v. Eng Ah Jam & Anor* (*supra*), and the Court of Appeal *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* (*supra*), that exemplary damages must be pleaded necessarily brings to mind the principles of pleadings. Even though counsel for the respondents informed the court that they do not pursue exemplary damages, we make the following observations. It starts with the function of the court to do justice. To do so, it applies the principle of giving a defendant an opportunity to defend. Hence, the party upon whom a claim is made must not be taken by surprise. Thus, a cause of action and the facts relied upon must be pleaded, so that a defendant has the opportunity to check and verify, to determine, even if not untrue and not incorrect, whether it is true and correctly stated. While the pleadings are thus the foundation for a claim, the reasons that make a pleading necessary provides the basis to refuse to prohibit a claim on the ground it has not been pleaded. For example, if the submission for a claim that is not pleaded shows it is founded upon evidence that has been admitted without objection, and upon which the other party had addressed E F G H I

in cross-examination or re-examination, or had the opportunity to do so, there is no reason for the trial judge to refuse to entertain the submission, particularly for exemplary damages because the very conduct warranting exemplary damages often only emerge during trial. It must be borne in mind that the conduct warranting exemplary damages emerge not from a party's own witnesses, but from the witnesses for the other party. In the process, the need to amend the pleadings may have been overlooked. On balance we do not think it is in the interests of justice that the failure to plead exemplary damages must necessarily bar a party from seeking it in submissions and the court from considering it. We think that the discussion in the judgment in *Kerajaan Negeri Selangor & Ors v. Sagong Tasi & Ors* (*supra*) amply demonstrate it is not a cut and dried matter.

**[34]** The submission that the High Court erred in holding that the appellant herein must pay damages because another party had built a building on the site where the church building had stood is without merit, for even if the respondents could use the said building, it is not the church building that they had built earlier.

**[35]** The further submission relies upon s. 72(5) of the Street, Drainage and Building Act 1974. It provides:

> (5) Where the owner fails to comply with the requirements of the notice, the local authority may do any or all of the acts required by the notice and notwithstanding the owner's liability to pay any fine under subsection (4), the owner shall pay such sums to the local authority as may be required under subsection (3) and shall be deemed to have indemnified the local authority in carrying out the terms of the notice as if he had requested the local authority to do so.

**[36]** Clearly, the provision that where the local authority carried out the demolition it can recover the costs of doing so from the owner in addition to any fine he may be required to pay, from the deeming provision that the owner is deemed to have indemnified the local authority for doing so. Section 72(5), in our view, underlines the need for the local authority to abide by the terms of its notice.

**[37]** In conclusion, we would allow the appeal in part to set aside the order as to exemplary damages. The appeal is otherwise dismissed with costs RM10,000 unless otherwise agreed. Deposit if any, to be refunded.

**[38]** We, therefore, allow the appeal and the orders accordingly.